STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2014
V	No. 310869 Oakland Circuit Court
DAVID BRANDELL JESSIE, Defendant-Appellant.	LC No. 2011-237057-FC

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felonious assault, MCL 750.82, carrying a concealed weapon, MCL 750.227, and assault and battery, MCL 750.81. Defendant was sentenced to 37.5 to 70 years' imprisonment for the second-degree murder conviction, two years' imprisonment for each felony-firearm conviction, 23 months to four years' imprisonment for the felonious assault conviction, two to five years' imprisonment for the carrying a concealed weapon conviction, and 93 days' imprisonment for the assault and battery conviction. We affirm.

Defendant first argues that the trial court pierced the veil of judicial impartiality when it made comments to the jury concerning a *Cobbs*[1] agreement. We disagree. To preserve a claim that the trial court made prejudicial comments in front of the jury, the defendant must object in the trial court. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). Here, defendant failed to object below to the challenged comments. Because defendant failed to preserve this issue, our review is for plain error affecting defendant's substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011).

Moreover, to the extent defendant challenges comments made by the trial court in its final instructions, this aspect of defendant's argument is waived. "[E]xpressions of satisfaction with the trial court's instructions constitute a waiver of any instructional error." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); see also *People v Kowalski*, 489 Mich

[1] *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

488, 504-505; 803 NW2d 200 (2011). Defense counsel twice affirmatively expressed approval of the court's final instructions. Hence, the portion of defendant's argument challenging the final instructions is waived. Waiver extinguishes any error, meaning there is no error to review. *Id*. at 503-504. In any event, the court's final instruction on this matter was merely duplicative of its comments earlier in the trial, and as discussed below, those comments did not pierce the veil of judicial impartiality.

"The Sixth Amendment of the United States Constitution and article 1, § 20 of the Michigan Constitution guarantee a defendant the right to a fair and impartial trial." *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). In determining whether a trial court's comments or conduct deprived a defendant of the right to a fair and impartial trial, this Court has noted that a trial court has wide discretion and power concerning the conduct of a trial, but that this power is not unlimited. *Id*. at 307-308.

> If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [*Jackson*, 292 Mich App at 598 (internal quotation marks omitted), quoting *Conley*, 270 Mich App at 308.]

Further, our Supreme Court has noted that a "trial court's comments must be fair and impartial, and the court should not make known to the jury its own views regarding disputed factual issues, the credibility of witnesses, or the ultimate question to be submitted to the jury." *People v Anstey*, 476 Mich 436, 453-454; 719 NW2d 579 (2006) (citations omitted).

Defendant contends on appeal that the trial court's explanation to the jury of a *Cobbs* agreement pierced the veil of judicial impartiality. The court made the following comments to the jury during the prosecutor's questioning of a prosecution witness, Djuamiel Huff, regarding Huff's guilty pleas to carrying a concealed weapon and accessory after the fact:

> Ladies and gentlemen, in the process of criminal arraignments and pleas there is what's called a plea agreement which is between the People and the defendant.
>
> And there's what's called a Cobbs agreement which is between the Court and the defendant. The Court it pertains to sentencing, okay. The plea bargain may deal with reducing charge and the like.
>
> What he's just described there was a Cobbs agreement with the Court, not with the People.

The trial court's comments to the jury concerning a *Cobbs* agreement did not pierce the veil of judicial impartiality. In *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993), our Supreme Court held that a trial court may provide a preliminary evaluation of the length of a sentence to a defendant who pleads guilty or no contest:

> At the request of a party, and not on the judge's own initiative, a judge may state on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.
>
> * * *
>
> The judge's preliminary evaluation of the case does not bind the judge's sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources. However, a defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation. [Emphasis removed.]

Here, Huff's testimony initially suggested incorrectly that he had a plea agreement *with the prosecutor* that "you guys" would sentence Huff within the guidelines. The trial court corrected this misunderstanding for the jury by clarifying that a *Cobbs* evaluation is provided *by the trial court*. The prosecutor then followed up with further questioning of Huff establishing that there was no plea agreement with the prosecutor and that Huff was not promised anything in exchange for pleading guilty. By clarifying that defendant's plea was entered following a *Cobbs* evaluation by the court rather than on the basis of a plea agreement with the prosecutor, the trial court properly exercised reasonable control over the mode of interrogating witnesses and the presentation of evidence to make the interrogation and presentation effective for the ascertainment of truth. See MRE 611(a).

Defendant argues that the trial court improperly suggested to the jury that the court had itself negotiated an agreement with Huff and that the court thereby implicitly signaled a belief in Huff's truthfulness; defendant contends that the court further suggested that Huff gained nothing from the prosecutor, when in fact he avoided murder and assault charges. These arguments lack merit. The trial court made no comment suggesting that it had *negotiated* an agreement with Huff or that it believed Huff's testimony; the court was merely drawing a distinction between a plea agreement with the prosecutor over reducing charges and a *Cobbs* evaluation by the trial court regarding a defendant's sentence. Although the trial court arguably could have explained more precisely that a court makes only a preliminary sentencing evaluation under *Cobbs*, instead of referring to a "*Cobbs* agreement," the court's terminology did not pierce the veil of judicial impartiality by suggesting a belief in Huff's truthfulness. Further, defendant's contention that the court's comments created a false impression that Huff gained nothing from the prosecutor is devoid of merit. There is no evidence that Huff was promised anything in exchange for his testimony in this case. Huff expressly testified that the prosecutor, the police, and the court made no such promises to him. The suggestion that Huff avoided murder and assault charges by testifying against defendant, and that the court's comments undermined defendant's ability to impeach Huff on this ground, has no support in the record.

Moreover, even if the trial court had implicitly expressed a view regarding Huff's credibility, any prejudice was cured because the trial court instructed the jury:

> My comments, rulings, questions and instructions are not evidence. If you believe I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the judges of the facts and you decide the facts from the evidence that you've heard presented here in court.

"It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, any prejudice arising from the court's comments concerning the *Cobbs* agreement was alleviated. Further, even without Huff's testimony, the evidence against defendant was overwhelming. In addition to Huff, another witness, Darryl Gray, identified defendant as the shooter. Also, multiple independent eyewitnesses identified the shooter as wearing a gray hoodie in the Eight Mile median, and it is undisputed that defendant rather than Huff was the person in the median who was wearing a gray hoodie. Accordingly, defendant has failed to establish that the trial court's conduct or comments unduly influenced the jury and deprived defendant of a fair and impartial trial.

Defendant next argues that the trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter. Defendant waived this purported instructional error because defense counsel affirmatively expressed satisfaction with the trial court's final jury instructions. *Kowalski*, 489 Mich at 504-505; *Matuszak*, 263 Mich App at 48, 57. Waiver extinguishes any error, meaning there is no error to review. *Kowalski*, 489 Mich at 503-504. We will nonetheless address the issue because it is relevant to defendant's ineffective assistance of counsel argument below.

If the purported instructional error was not waived, the issue would nonetheless be unpreserved. "A party must object or request a given jury instruction to preserve the error for review." *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000); see also MCL 768.29 ("The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused."). Here, defendant concedes on appeal that he failed to request an instruction on involuntary manslaughter.

In general, this Court reviews claims of instructional error de novo. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). However, a trial court's determination that a specific instruction is inapplicable to the facts of a case is reviewed for an abuse of discretion. *Id*. "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). This Court reviews jury instructions in their entirety, and even if imperfect, the instructions do not require reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). Unpreserved claims of instructional error are reviewed for plain error. *Matuszak*, 263 Mich App at 48.

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). "A necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich

527, 540; 664 NW2d 685 (2003). "Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Id*. at 536. The elements of involuntary manslaughter are included in the offense of murder because the mens rea of involuntary manslaughter is included in the greater mens rea of murder. *Id*. at 541. Involuntary manslaughter is therefore a necessarily included lesser offense of murder. *Id*. "Consequently, when a defendant is charged with murder, an instruction for . . . involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*.

Here, a rational view of the evidence did not support an instruction on involuntary manslaughter. Defendant asserts on appeal that the jury could have inferred that defendant fired the gun accidentally or as a warning shot. However, there was no evidence presented at trial to support a theory that defendant killed the victim without malice. The testimony of multiple witnesses established that defendant aimed the gun at the victim and then shot him. This testimony does not suggest an accidental firing or a warning shot. Further, the defense theory at trial was that defendant did *not* kill the victim; defendant claimed that Huff was the shooter. Defendant testified that while in the Eight Mile median, Huff pulled out the gun and aimed it, and that defendant then heard a gunshot fired. Likewise, defense counsel argued in closing that "Mr. Huff never tells the truth because he is the one with the black gun and he is the shooter." See *id*. at 546-547 (holding that a rational view of the evidence did not support an involuntary manslaughter instruction where the defendant's theory at trial was that another person was responsible for the victim's death). Because a rational view of the evidence did not support an involuntary manslaughter instruction, the trial court did not plainly err in failing to provide such an instruction.

Defendant next argues that the prosecutor committed misconduct during closing argument. We disagree. "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Here, defendant failed to contemporaneously object or request a curative instruction with respect to any of the alleged instances of prosecutorial misconduct. Hence, the issue is unpreserved.

> Issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. Further, allegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context.
>
> Unpreserved issues are reviewed for plain error affecting substantial rights. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Further, this Court cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. [*Id*. at 475-476 (internal quotation marks, brackets, and citations omitted).]

A prosecutor may not vouch for the credibility of witnesses by suggesting some special knowledge that the witnesses are testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor may, however, argue from the facts and testimony that the witnesses are credible or worthy of belief. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). A prosecutor may also argue from the facts that the defendant or the defense witnesses are unworthy of belief. *Id*. at 66-67. In general, prosecutors are accorded wide latitude in making their arguments, "and are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). A prosecutor need not confine arguments to the blandest possible terms. *Dobek*, 274 Mich App at 66. It is improper, however, for a prosecutor to express a personal belief in the defendant's guilt. *Seals*, 285 Mich App at 24.

Here, defendant complains of the following comments by the prosecutor during closing and rebuttal arguments:

> But the bottom line is when [defendant] testified, ladies and gentlemen, he was not truthful. And *I think* that's pretty obvious from his testimony.
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> * * *
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> *I submit to you* he has a motive not to tell the truth in this particular case because of the obvious charges that he's facing. What reason do those witnesses have to lie? There is absolutely none.
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> * * *
>
> *I submit to you* what he told you is hard to believe, but that again is up to you to determine, ladies and gentlemen.
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> * * *
>
> *I submit to you* the evidence is clear as to what happened based upon eyewitness testimony during the middle of the day.
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> * * *
>
> *I submit to you* there's no reason to doubt any of [three of the eyewitnesses'] testimony and what they saw, three of them, was this individual fire a weapon. [Emphasis added.]

The above comments did not comprise misconduct. The prosecutor was merely arguing from the facts and testimony that the eyewitnesses were worthy of belief and that defendant's testimony was unworthy of belief. Such argument from the facts and testimony is proper. *Dobek*, 274 Mich App at 66-67. Viewed in context, all of the challenged comments were made in connection with a discussion of the evidence presented at trial and reasonable inferences from the evidence. Although the prosecutor argued from the evidence that the eyewitnesses lacked a motive to lie and that defendant had a motive to be untruthful given the charges he was facing, at no point did the prosecutor vouch for the credibility of the eyewitnesses by suggesting special

knowledge or express a personal belief about defendant's guilt. The prosecutor's use of the phrases "I think" and "I submit to you" does not require reversal where he did not improperly vouch for defendant's guilt. See *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973) ("If the prosecutor says 'I believe' rather than 'the evidence shows', this in and of itself does not constitute reversible error."). Because the prosecutor's closing and rebuttal arguments were based on the evidence and reasonable inferences from the evidence as they related to his theory of the case, the prosecutor did not commit misconduct.

In any event, even if the prosecutor's comments were improper, defendant has failed to establish that a timely curative instruction could not have alleviated any prejudice. *Bennett*, 290 Mich App at 476. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Seals*, 285 Mich App at 22. And although defendant did not request a curative instruction, the trial court instructed the jury that the lawyers' statements and arguments were not evidence and that the jury should decide the case based only on the evidence admitted at trial. This instruction dispelled any potential prejudice with respect to the alleged prosecutorial misconduct. See *People v Parker*, 288 Mich App 500, 512; 795 NW2d 596 (2010); *People v Ullah*, 216 Mich App 669, 682-683; 550 NW2d 568 (1996). "It is well established that jurors are presumed to follow their instructions." *Graves*, 458 Mich at 486. Thus, defendant has failed to establish that a plain error affected his substantial rights in connection with his unpreserved prosecutorial misconduct claim.

Next, defendant argues that he was denied the effective assistance of counsel. We disagree. To preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther*[2] evidentiary hearing. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). Defendant failed to file either such motion below. Because defendant did not preserve this issue, our review is limited to mistakes apparent on the existing record. *Id.* "A claim of ineffective assistance of counsel is a mixed question of law and fact." *Id.* This Court reviews any findings of fact for clear error, but the ultimate constitutional issue arising from an ineffective assistance claim is reviewed de novo. *Id.*

"To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability [exists] that the outcome of the proceeding would have been different but for trial counsel's errors." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Petri*, 279 Mich at 411. This Court does not substitute its judgment for that of counsel regarding matters of trial strategy, nor does it assess counsel's performance with the benefit of hindsight. *Id.* "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Here, defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness. Defendant contends that defense counsel was ineffective

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

for (1) permitting the trial court to pierce the veil of judicial impartiality by misleading the jury regarding the benefits Huff received for testifying, (2) failing to request a jury instruction on the lesser included offense of involuntary manslaughter, and (3) allowing the prosecutor to express his personal belief concerning defendant's credibility and the weight of the evidence. But as discussed above, defendant's underlying arguments on those issues are devoid of merit. That is, (1) the trial court did not pierce the veil of judicial impartiality, (2) the evidence did not support an involuntary manslaughter instruction, and (3) the prosecutor did not commit misconduct. Defense counsel was not ineffective for failing to advance meritless arguments or raise futile objections concerning those issues. *Id*. Accordingly, defendant's ineffective assistance of counsel claim premised on his underlying meritless arguments must fail.

Defendant next argues that the trial court erred in scoring offense variables (OVs) 3, 14, and 19. We disagree. A party may not raise on appeal an issue challenging the scoring of the guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010); see also MCR 6.429(C). Here, defendant's guidelines range was calculated at 270 to 450 months. Defendant's minimum sentence of 450 months is within the guidelines range. Defendant did not raise his challenges to the scoring of OVs 3, 14, and 19 at sentencing, in a proper motion for resentencing, or in a proper motion to remand.[3] Therefore, this issue is unpreserved.

A trial court's factual findings in scoring offense variables are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Whether the facts found by the trial court are adequate to satisfy scoring conditions prescribed in the statute is a question of statutory interpretation reviewed de novo. *Id*. Because the issue is unpreserved, our review is for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007).

OV 3 concerns physical injury to a victim. MCL 777.33(1); *People v Laidler*, 491 Mich 339, 343; 817 NW2d 517 (2012). The statute provides:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and *by assigning the number of points attributable to the one that has the highest number of points*:

[3] Although defendant filed in this Court a motion to remand, that motion pertained to the separate sentencing issue discussed below, i.e., whether resentencing is required because defendant's sentence was increased based on facts that were not found by a jury or proved beyond a reasonable doubt. Therefore, although this Court's order denying the motion to remand indicated that defendant had preserved for appellate review the objections to the scoring of the sentencing guidelines raised in the motion to remand, *People v Jessie*, unpublished order of the Court of Appeals, entered October 15, 2013 (Docket No. 310869), this rendered preserved the issue addressed below rather than the instant issue.

(a) A victim was killed	100 points
(b) A victim was killed	50 points
(c) Life threatening or permanent incapacitating injury . . .	25 points
(d) Bodily injury requiring medical treatment . . .	10 points
(e) Bodily injury not requiring medical treatment . . .	5 points
(f) No physical injury occurred to a victim	0 points

(2) All of the following apply to scoring offense variable 3:

* * *

(b) Score 100 points if death results from the commission of a crime *and homicide is not the sentencing offense*. [MCL 777.33 (emphasis added).]

In *People v Houston*, 473 Mich 399, 401-402; 702 NW2d 530 (2005), our Supreme Court held that 25 points must be assessed under OV 3 for a homicide victim's life-threatening or permanent incapacitating injury when homicide was the sentencing offense. The Court explained:

> The defendant not only killed the victim, but in the process also caused a physical injury – a gunshot wound to the head. Consequently, although the court did not have the option of assessing one hundred points for OV 3, it properly assessed twenty-five points on the basis of the next applicable variable element: "Life threatening or permanent incapacitating injury." This conclusion is mandated by the fact that the statute governing OV 3 requires that trial courts assess the highest number of points possible. [*Id*. at 402.]

The holding in *Houston* is directly controlling. Here, as in *Houston*, defendant not only killed the victim, but in the process also caused a physical injury, i.e., a gunshot wound to the head. Because homicide was the sentencing offense, the trial court could not assess 100 points for the victim's death. MCL 777.33(2)(b). But because the victim suffered a gunshot wound to the head, the trial court was required to score OV 3 at 25 points for the victim's life-threatening injury. *Houston*, 473 Mich at 402. Defendant argues that *Houston* should be overruled on the basis of the reasoning in the dissenting opinion in *Houston*. However, this Court is bound by stare decisis to follow our Supreme Court's decisions. *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000). "[O]nly the Supreme Court has the authority to overrule its own decisions." *People v Crockran*, 292 Mich App 253, 256; 808 NW2d 499 (2011). Therefore, we must following the holding in *Houston*. The trial court did not err in scoring OV 3.

Next, defendant challenges the scoring of OV 14, which addresses the offender's role. MCL 777.44(1); *People v Gibbs*, 299 Mich App 473, 493; 830 NW2d 821 (2013). Under OV 14, "[t]he sentencing court must assess 10 points if 'the offender was a leader in a multiple offender situation.'" *Gibbs*, 299 Mich App at 493, quoting MCL 777.44(1)(a). A "multiple

offender situation" is "a situation consisting of more than one person violating the law while part of a group." *People v Jones*, 299 Mich App 284, 287; 829 NW2d 350 (2013), vacated in part on other grounds 494 Mich 880 (2013). A "leader" is a person who is a guiding or directing head of a group. *Id*. The entire criminal transaction is considered when scoring this variable. MCL 777.44(2)(a); *Gibbs*, 299 Mich App at 493-494. Thus, unlike most offense variables, points must be assessed under OV 14 for conduct that extends beyond the sentencing offense. *People v McGraw*, 484 Mich 120, 127; 771 NW2d 655 (2009).

Defendant argues that the criminal transaction was not a "multiple offender situation" because Huff testified that he played no role in the crime; defendant further contends that there is no evidence that defendant was a leader. We disagree on both points.

First, a "multiple offender situation" existed because more than one person was violating the law while part of a group. The criminal transaction involved two offenders, defendant and Huff. Huff was convicted of carrying a concealed weapon and being an accessory after the fact. Huff and defendant had jointly purchased the gun used in the offense and owned it together, and during the criminal transaction, Huff toyed around and touched the gun at various points and had in his pocket a bag containing bullets for the gun. Huff held the gun by his side when defendant punched a woman during the criminal transaction.

Second, the evidence supported the conclusion that defendant was the leader. After defendant saw a woman he knew on the street, defendant directed Huff to hold the gun, and Huff did so. Huff then held the gun as defendant assaulted the woman. Defendant initiated the confrontations, including assaulting the woman, pointing the gun at a man in the Eight Mile median, and, according to multiple eyewitnesses, aiming the gun at and shooting the murder victim. As defendant and Huff fled the scene of the shooting, defendant told Huff to take the gun, which Huff did. Later, in a backyard on Hubbell Street, defendant took the gun back from Huff and threw it over a fence. Overall, the testimony establishes that defendant was the guiding or directing head of the group. The trial court properly scored 10 points for OV 14.

Defendant next challenges the score of 10 points for OV 19. Under OV 19, a court must assess 10 points if the offender interfered with or attempted to interfere with the administration of justice. MCL 777.49(1). In assessing points under OV 19, a court may consider the defendant's conduct after the completion of the sentencing offense. *People v Smith*, 488 Mich 193, 200; 793 NW2d 666 (2010). A defendant interferes with the administration of justice by "oppos[ing] so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). Interference with the administration of justice encompasses more than the actual judicial process and can include conduct that occurs before criminal charges are filed, including acts that do not necessarily constitute chargeable offenses. *Id*., citing *People v Barbee*, 470 Mich 283, 286-288; 681 NW2d 348 (2004). "The investigation of crime is critical to the administration of justice." *Barbee*, 470 Mich at 288. Conduct that comprises interference or attempted interference with the administration of justice includes "threatening or intimidating a victim or witness, telling a victim or witness not to disclose the defendant's conduct, fleeing from police contrary to an order to freeze, attempting to deceive the police during an investigation, interfering with the efforts of store personnel to prevent a thief from leaving the premises with unpaid store property, and committing perjury in a court proceeding." *Hershey*,

303 Mich App at 344. Interference with justice does not require a threat. *People v Steele*, 283 Mich App 472, 493; 769 NW2d 256 (2009).

Here, it is true that the police had not ordered defendant to stop when he walked away after emerging from the backyard on Hubbell; hence, this conduct arguably did not comprise interference with justice. However, other evidence supported the OV 19 score. During his flight from the scene of the shooting, defendant removed and discarded articles of clothing he wore during the shooting, i.e., his gray hoodie and hat. Later, according to Huff, when he and defendant were in the backyard on Hubbell, defendant threw the gun on the other side of a fence. Police then found the gun on the roof of a detached garage on Hubbell. Defendant's disposal of his clothes and the gun are reasonably understood as efforts to conceal evidence, including the murder weapon, and thereby deceive the police in their investigation. Cf. *Ericksen*, 288 Mich App at 204 (asking a companion to dispose of a knife used to stab the victim, along with other acts, were attempts to interfere with the administration of justice). Defendant asserts that he was not required to help the police by giving them evidence. But defendant did not merely fail to provide evidence; he actively attempted to dispose of and thereby conceal evidence, including the murder weapon. Defendant also contorted his face by moving his face muscles during an identification procedure. Overall, the preponderance of the evidence supports the finding that defendant was attempting to interfere with the administration of justice.

Defendant's final argument on appeal is that his rights under the Fifth and Sixth Amendments were violated by judicial fact-finding on certain offense variables, which increased the floor of his permissible sentence. Defendant relies for his argument on the holding in *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). However, this Court recently held that the decision in *Alleyne* does not apply to Michigan's indeterminate sentencing scheme and the sentencing guidelines that effectuate it. See *People v Herron*, 303 Mich App 392, 403-404; 845 NW2d 533 (2013). Because defendant's argument on this issue is premised on the application of *Alleyne* to Michigan's indeterminate sentencing scheme, a premise that has now been rejected by *Herron*, his argument lacks merit.

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering